BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ANGEL F. TAMAMES-PUBILLNOES	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,047,917
CARGILL MEAT SOLUTIONS CORP.	)	
Respondent	)	
AND	)	
	)	
AMERICAN INTERNATIONAL SOUTH INSURANCE	)	
Insurance Carrier	)	

ORDER

Claimant appeals the February 12, 2010, Order Denying Compensation of Administrative Law Judge Pamela J. Fuller (ALJ). Claimant was denied benefits after the ALJ determined that claimant had failed to prove that his heart attack was due to the exertion of the work being more than his usual and regular employment as required by K.S.A. 2008 Supp. 44-501(e).

Claimant appeared by his attorney, Stanley R. Ausemus of Emporia, Kansas. Respondent and its insurance carrier appeared by their attorney, D. Shane Bangerter of Dodge City, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the deposition of Muhammad Khan, M.D., taken January 13, 2010, with attachments; the deposition of Angel Tamames Pubillnoes taken January 22, 2010; the deposition of Bobbi Baca taken February 3, 2010, with attachments; the transcript of Preliminary Hearing held February 10, 2010, with attachments; and the documents filed of record in this matter.

ISSUE

Did claimant suffer accidental injury which arose out of and in the course of his employment with respondent? Claimant alleges the task he was performing at the time of the onset of his heart symptoms exceeded the normal exertion required in his regularly

assigned job. Respondent contends that the task claimant was performing was part of claimant's normal job and the exertion was no more than any other employee would perform while doing the same task. Respondent also contends that claimant's heart condition, and possibly even the actual heart attack, occurred the week before claimant began working for respondent. The symptoms experienced by claimant while working for respondent were no different than the symptoms claimant reported to the emergency room as having occurred the week before.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the Order Denying Compensation should be affirmed.

Claimant was flown from Florida to Dodge City, Kansas, on Friday, December 12, 2008. Claimant had applied for a job with respondent as a meat cutter. Claimant began orientation and training on Monday, December 15, 2008, and remained in training for three days. Thursday, December 18, was claimant's first actual day on the job. Claimant was being trained by a supervising trainer named Theodore, who would show claimant how to perform the job. Claimant was first issued the proper equipment and was then assigned to department 517, table # 3 where he would take ribs off a line with a long hook, cut the ribs into smaller pieces, using a small hook and a knife, and then place the ribs back onto the conveyer line. Claimant testified that he had 45 days to qualify at an acceptable speed on this job.

On December 19, 2008, claimant's second day on the job, he returned to the same job and worked the job for several hours. At some point in his shift, which ran from 3:15 p.m. to midnight, claimant and another trainee were told to go to a conveyer belt near their work station. The conveyer was not working and the meat product on the line was stacking up. Claimant and the other recent hire transferred the meat from the broken line to another location, a distance of about four steps or approximately 4 meters. The meat product weighed from 30 to 40 pounds. Claimant and the co-worker did this task for about one hour. At the end of that time, claimant returned to his job on table 3 in department 517.

Claimant testified that he had chest pains shortly after returning to table 3,[1] or while just finishing the meat transfer job.[2] Claimant reported the chest pain to Theodore and was taken to the plant nurses station, arriving at about 9:00 p.m. An ambulance was called by the nursing staff. Bobbi Baca, an RN and respondent's head nurse, testified that when the EMS personnel lifted claimant's shirt to attach the cardiology leads to his chest, they found a nitroglycerin patch (nitro patch) attached to claimant's ribs. Claimant was

[1] Claimant's Depo. at 26.

[2] P.H. Trans. at 12-13.

experiencing chest pains and his blood pressure was 160/100, which she testified was high. The nitro patch was described as a .4-milligram nitro patch which was only available with a doctor's prescription. At the preliminary hearing, claimant denied knowing about the nitro patch and denied having a prescription for the medication. He did testify that he had earlier purchased a pain patch for muscle pain. But the pain patch was purchased over the counter.

Claimant was transported to the local hospital emergency room. The emergency records indicate that claimant had suffered chest pains approximately one week before, with pain behind the sternum, radiating into the neck and left arm. Claimant denied having any such pain. He testified that he had suffered chest pains prior, but they were years before. He acknowledged that he had suffered similar symptoms two to three times before, while having sex and while walking fast. He had been admitted to the Miami (Florida) hospital previously, but no records from that treatment are contained in this record.

Claimant came under the care of board certified cardiologist Muhammad Khan, M.D. Tests, including a coronary angiogram, indicated claimant suffered from severe blockage in several of his arteries. One artery was 100 percent blocked, another 99 percent blocked, a third 90 percent blocked and a fourth 70 to 80 percent blocked. Dr. Khan diagnosed claimant with significant heart disease. He testified that claimant had suffered a very small heart attack, with little damage to the heart. Dr. Khan stated that claimant's heart condition had taken years to develop and that claimant was a walking time bomb regardless of what job he worked. Dr. Khan did state that the physical exercise from claimant's job with respondent would exceed the threshold claimant could handle and probably led to the heart attack. Nevertheless, if claimant had come to the doctor on December 12, and undergone the heart catheterization, he would have been treated the same. Claimant was transferred to Wichita, Kansas, where he underwent what appeared to be a quadruple bypass under the hand of board certified cardiology surgeon Antonio Laudito, M.D.

Claimant's past employment history contains no indication of a physical labor job. Claimant, a Cuban national, who has become a naturalized citizen, was a journalist in his home country. He also spent approximately 7 years in a Cuban prison. He was allowed to leave Cuba in 1984 and moved to Puerto Rico, where he lived for 18 years, coming to Miami in 2002. His jobs in both Puerto Rico and Miami were sedentary office jobs. He applied for work with respondent due to the significant difference in earning potential, with the Miami job paying $6.78 and the Cargill job paying from $12.30 to $13.30 per hour.

A representative of respondent, Ron Jensen, provided an affidavit which was marked as Respondent's Exhibit 1 to the preliminary hearing. The affidavit states that claimant was hired as an arm boner working with weights of approximately 10 to 20 pounds. The activity of moving product from a broken conveyer line was a normal aspect of the job and occurred two to three times per week. A worker with less seniority

and less training would almost always be used to move the product, as his or her ability to perform a trimming job would be less than a more trained and experienced worker. However, any employee could be asked to work the transfer job, if the need arose.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[3]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[4]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[5]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[6]

K.S.A. 2008 Supp. 44-501(e) states:

> Compensation shall not be paid in case of coronary or coronary artery disease or cerebrovascular injury unless it is shown that the exertion of the work

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[3] K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

[4] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[5] K.S.A. 2008 Supp. 44-501(a).

[6] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

> necessary to precipitate the disability was more that the employee's usual work in the course of the employee's regular employment.[7]

Claimant argues that the job he was performing, i.e. the transfer of meat from the broken conveyer, exceeded his normal job duties. The Board disagrees. Claimant had only been on the job for a few days when the heart attack occurred. He had spent the first three days in orientation and training. The fourth day was spent with a trainer learning to cut the rib pieces. The fifth day was also spent cutting the rib pieces and, for a time, moving the meat from the broken conveyer. Mr. Jensen, in his affidavit, made it clear that broken conveyers were to be expected and actually occurred several times a week. Additionally, the least experienced workers were the ones used to transfer the product, as they caused the least amount of work stoppage when taken from their jobs.

The Kansas Supreme Court, in *Makalous*,[8] addressed the language contained in K.S.A. 44-501 dealing with the "usual vs. unusual" dispute contained in the so-called "heart amendment" to K.S.A. 44-501, stating:

> What is usual exertion, usual work, and regular employment as those terms are used in the 1967 amendment to K.S.A. (Now 1972 Supp.) 44-501 will generally depend on a number of surrounding facts and circumstances, among which the daily activities of the workman may be one, but only one, among many factors.
>
> Whether the exertion of the work necessary to precipitate a disability was more than the workman's usual work in the course of his regular employment presents a question of fact to be determined by the trial court.[9]

The Board finds that the work being done by claimant involved the usual tasks associated with that job. The exertion was not more than claimant's usual labor in this job with this employer. Therefore, the determination by the ALJ, that claimant has failed to prove that the exertion of the work necessary to precipitate the disability was more than his usual work, is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member,

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[7] K.S.A. 2008 Supp. 44-501(e).

[8] *Makalous v. Kansas State Highway Commission*, 222 Kan. 477, 565 P.2d 254 (1977).

[9] *Id.*, at 481, citing *Nichols v. State Highway Commission*, Syl. ¶ 3 and 4, 211 Kan. 919, 508 P.2d 856 (1973).

[10] K.S.A. 44-534a.

as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has failed to prove that the exertion necessary to perform his work on the day of his heart attack was more than his usual work. Therefore, the denial of benefits by the ALJ is affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order Denying Compensation of Administrative Law Judge Pamela J. Fuller dated February 12, 2010, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of May, 2010.

HONORABLE GARY M. KORTE

c: Stanley R. Ausemus, Attorney for Claimant
D. Shane Bangerter, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge